The "Advice" Exception to the No-Contact Rule

By Nathan M. Crystal

One of the most common ethical questions that lawyers ask involves the "no-contact" rule, South Carolina Rule of Professional Conduct (SCRPC) 4.2:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

While the rule is short, its application is wide, and the number of issues it raises are substantial. A recent, controversial ABA ethics opinion, Formal Opinion #11-461, shows the importance of the rule.

The purpose of the rule is to prevent overreaching by opposing counsel, interference with the client-lawyer relationship, and uncounseled disclosure of information about the representation. SCRPC 4.2, cmt. 1. The rule applies not only to direct contacts between a lawyer representing a client with another person who is represented by counsel in the matter, but also to indirect contacts by a person acting on behalf of the lawyer. Model Rule 8.4(a). Thus, a lawyer could not hire an investigator to contract a represented opposing person. On the other hand, clients have a right to communicate directly with each other without the consent of their lawyers. SCRPC 4.2, cmt. 4; ABA Formal Opinion #11-461, n.3. In addition, a lawyer may advise a client about the client's right to communicate directly with a represented person. SCRPC 4.2, cmt. 4. Advice by a lawyer to a client about the client's right to communicate with a represented person does not amount to an indirect communication by the lawyer. SCRPC 8.4(a), cmt. 1.

How far may a lawyer go in advising and assisting a client about the client's right to communicate with a represented person? Consider the following questions:

- May a lawyer initiate discussion about the client's right to communicate with an unrepresented person, or is the lawyer limited to responding to a client's request for information about the propriety of such a contact?
- May the lawyer suggest changes or additions to a letter, e-mail, or other written communication that the client intends to send to a represented person?
- May a lawyer counsel the client about how to conduct a face-to-face meeting with a represented person?
- May the lawyer draft a document that the client will either send or present to the unrepresented person for that person's signature—for example, a contract or a release?
- May the lawyer suggest to the client that the client hire an investigator who may contact or communicate with the represented person for the purpose of gathering evidence to support the client's case?

In 1992 in Formal Opinion #92-362, the ABA Committee on Ethics and Professional Responsibility dealt with a situation in which the lawyer for the plaintiff in a civil action had made a settlement offer but had not received a response. Trial was set in two weeks. The Committee advised that the lawyer had an ethical duty under Model Rules 1.1, 1.2(a), and 1.4 to advise the plaintiff that the lawyer believed that defense counsel had not presented the settlement offer to the defendant and that plaintiff had the right to speak directly with the defendant to determine whether the settlement offer had been conveyed. South Carolina opinions are in accord. See S.C. Bar Ethics Adv. Op. ##93-16 and 90-17.

In Formal Opinion #11-461, the ABA Committee dealt with a number of other aspects of the "advice exception" to Rule 4.2. The Committee noted that some opinions and court decisions had attempted to draw distinctions about the scope of the advice exception. Some authorities would have allowed the lawyer to respond to client inquiries about communication with a represented person, but would not permit the lawyer to initiate the discussion. Other authorities suggested that a lawyer could not ethically "script" or "mastermind" the client's communications. The ABA Committee rejected these approaches. The Committee concluded that the lawyer's duties to his client, including the duty of competency under Rule 1.1, the duty to counsel under Rule 1.2(a), and the duty of communication under Rule 1.4, coupled with the comments to both Rules 4.2 and 8.4 allowing lawyers to give advice to clients about their right to communicate with represented people, supported a broad reading of the "advice exception." Accordingly, the Committee concluded that a lawyer could ethically give "substantial assistance" to a client regarding substantive communications with a represented person. The advice could include "the subjects or topics to be addressed, issues to be raised and strategies to be used." The lawyer was free to initiate the idea of communication and need not wait for the client to raise the subject. The lawyer's ethical participation was not limited to general discussions. The lawyer could ethically "review, redraft and approve a letter or a set of talking points that the client has drafted and wishes to use in her communications with her represented adversary." Moreover, a lawyer could ethically draft for the client a "formal agreement ready for execution." The Committee reserved judgment on

one issue: Could the lawyer advise the client about hiring an investigator who would make direct contact with the unrepresented person? See n. 16.

The Committee recognized that its approach ran the risk of violation of the policies on which Rule 4.2 is based, so it offered this limitation to its advice:

> To prevent such overreaching, a lawyer must, at a minimum, advise her client to encourage the other party to consult with counsel before entering into obligations, making admissions or disclosing confidential information. If counsel has drafted a proposed agreement for the client to deliver to her represented adversary for execution, counsel should include in such agreement conspicuous language on the signature page that warns the other party to consult with his lawyer before signing the agreement.

Was the Committee correct in its analysis? The Committee's approach can be characterized as "allow with a warning." In other words, the Committee seems to be saying that there are practically no limits on a lawyer's assistance to a client who wishes to communicate with a person who is represented by counsel so long as the lawyer counsels the client to give an appropriate warning to the represented person and inserts a clear notification to the represented person in any document the lawyer drafts.

I would approach the issue differently. To me the fundamental issue is whether the lawyer intends to use the client to make a contact with the represented person that the lawyer could not make. If so, the lawyer's conduct should be improper under Rule 4.2. For example, to take the issue not decided by the Committee, if the lawyer asks the client to hire an investigator to contact the represented party with a view to gaining admissions from that person, the lawyer's conduct should be found to be improper. Similarly, if a lawyer drafts a settlement agreement that contains provisions not discussed with the opposing lawyer and tries to get the client to present the agreement to the represented person for that person's signature, in my judgment the lawyer has acted improperly, even if the agreement has the warning suggested by the Committee. On the other hand, if the client is frustrated by a lengthy delay in negotiations, attributes the delay to the opposing lawyer, and wants to present an agreement directly to the opposing party for that party's signature, the lawyer should be able to assist the client because the lawyer's purpose is not to engage in a communication that violates the policies on which Rule 4.2 is based. In other words, in my opinion the proper approach is to focus on the lawyer's purpose and intent rather than the particular conduct of the lawyer.

It could be objected that my approach is difficult to apply because determination of a lawyer's purpose or intent is not easy. However, many of the ethical rules turn on the lawyer's knowledge; determination of intent should be no more difficult than determination of knowledge.

Two other points about the advice exception to Rule 4.2. First, lawyers must keep in mind the choice of law rules that apply with regard to ethical matters. If a matter is pending before a tribunal, the rules of the jurisdiction in which the tribunal sits will apply to the lawyer's conduct, not the rules of the lawyer's home jurisdiction. See SCRPC 8.5(b)(1). If a South Carolina lawyer is appearing *pro hac vice* in a case in a jurisdiction that follows a narrow approach to the advice exception, the lawyer must adhere to that approach. See Formal Opinion #11-461, ns. 5, 8, 9, 11, for a discussion of authorities in other jurisdictions that take a narrower approach to the advice exception from the approach recommended by the Committee.

Second, in Opinion #92-362 the Committee held that a lawyer had a *duty* to raise with the client the possibility of communicating with the represented person an offer of settlement that the lawyer believed had not been conveyed by defense counsel. Opinion #11-461 cites 92-362 with approval; 11-461 could be read to impose a duty on lawyers to use the advice exception when representing a client. In my opinion, there shouldn't be such a duty. Some lawyers may be comfortable with drafting for a client a settlement document that the client plans to present to the represented person for that person's signature, but others may feel that this amounts to overreaching. Reasonable lawyers can disagree on this issue. Whether a lawyer gives the assistance that a client wants or not should be a tactical decision within the discretion of the lawyer. See SCRPC 1.2(a).

Formal Opinion #11-461 has been controversial and is under reconsideration. James Podgers, *On Second Thought: Changes Mulled Re ABA Opinion on Client Communications Issue*, ABA Journal (Jan. 2012). Regardless of whether the opinion remains as issued or is changed, the opinion is only advisory. Issuance of the opinion, however, has done a service to the bar by highlighting the complexity of the application of the advice exception to Rule 4.2.■

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